No. 11639

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HANSEN & ROWLAND, INC., a corporation
Appellant

vs.

C. F. LYTLE COMPANY, INC., a corporation, and GREEN CONSTRUCTION COMPANY, a corporation,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEES

J. CHARLES DENNIS
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OFFICE AND POST OFFICE ADDRESS:
324 FEDERAL BUILDING
TACOMA 2, WASHINGTON

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JURISDICTION

We concede the jurisdiction of the Court on this appeal for the reasons set forth in appellant's brief.

STATEMENT OF THE CASE

Pleadings.

The appellant's resume of the pleadings is substantially accurate, except that its complaint actually

was predicated upon the theory of an account stated. (Tr. 6).

Facts.

This is a second appeal.

In order to refresh the Court's recollection of the facts as they were submitted in the first appeal, (Opinion, 151 F. (2d) 573) we repeat here "the Summary" of the evidence as set forth in our brief on the first appeal.

> "The defendants (present appellees) entered into a cost-plus-a-fixed-fee contract with the United States government to perform certain operations on a portion of the Alaska highway designated as 'from a point on the international boundary line between Canada and Alaska, to a point near Slana, Alaska, approximately 155 miles, designated 'Sections A-1 and A-2.' A number of other contractors, herein designated as associate contractors, had individual contracts with the government for certain specified operations on the same portion of the highway. The defendant's contract was known as an Engineering Management contract.
>
> "The defendants applied to the plaintiff (present appellant) for a comprehensive liability insurance policy to cover their operations on this portion of the highway. The plaintiff was an agent for the Phoenix Indemnity Co., of New York, which company issued the policy through plaintiff. The policy was issued July 17, 1942, and it took effect as of June 17, 1942. It was cancelled as of August 31, 1942. The policy insured the defendants and all the associate con-

tractors and provided for a premium at the rate of 85 cents per $100.00 remuneration paid to employees of all the contractors. On the basis of the payroll claimed by the plaintiff for the period of coverage the premium at the 85 cent rate amounted to $8,969.31. (Tr. 161). Because of a so-called 'short rate' premium the premium claimed and allowed by the court's judgment, came to $16,153.73. There was no loss under the policy during the period of coverage. (Tr. 42). When the policy was cancelled it was replaced in another company at an ultimate rate of 4 cents per $100.00 of payroll. (Tr. 200).

"The defendants contended that the million odd dollars of alleged payroll upon which the premium was claimed was not the payroll of employees of the contractors, but was the payroll of government employees. They further contended that if the workmen be considered employees of the contractors, that the payroll upon which the premium was claimed was far in excess of the payroll attributable to premium since only two of the contractors actually worked upon the section of the Alaska Highway designated in the policy during the period of coverage, and that the only payroll upon which premium should have been determined was the payroll of these two contractors, amounting to $90,053.81."

This Court, on the first appeal, held against our contention that the employees were government employees rather than contractors' employees. On our second contention in the first appeal, namely, that the trial Court erred in its failure to restrict the premium base to the work actually done within the 155

miles of highway, we were in effect sustained and the judgment of the trial Court was reversed and the cause remanded, with directions to take evidence on the issue as to whether some part of that section of the payroll representing wages of workers traveling to Alaska prior to assignment should come within the premium base.

Pursuant to that mandate further proceedings were had before the trial Court commencing on November 2, 1946. As a result of those proceedings the Court entered additional Findings of Fact and Conclusions of Law, and a Judgment allowing recovery in favor of the present appellant in the sum of $4,904.10, together with costs. (Tr. 468-475).

At the rehearing the trial Court stated its interpretation of this Court's mandate as follows:

> *The Court*: What I tried to say this forenoon and perhaps I did not say it as clearly as I should, under this decision of the Circuit Court I feel that I (70) am impelled to find that the insurance rates should be calculated upon all employees, or their wage that they received in working on the two sections — that's 1 and 2, during the period here involved, and in addition thereto, there should be included, in so far as it can be ascertained, the time these employees, or employees of these same contractors put into unloading the equipment and supplies that were to be used on this contract, plus the time that they put into maintaining the highway on Section 3,

so that it was available for the movement of this heavy equipment, plus any travel time within that period covered by the contract. (Tr. 545).

Following that formula the trial Court made Findings to the effect that the total remuneration attributable to the premium base was made up of the following items:

Travel time and unloading and moving equipment (F. of F. 1, Tr. 469)	$202,882.86
Payroll actually expended within 155 miles (F. of F. 2, Tr. 469)	90,053.81
Maintaining Section A-3 in order to convey supplies and equipment to 155 mile section (F. of F. 3, Tr. 470)	27,594.00
Total	$320,530.49

The premium figured on the short rate basis on this total remuneration amounted to $4,904.10, for which judgment was entered.

The item of $202,882.68 for travel time and unloading and moving equipment is made up of the following figures:

Travel Pay of Welding Brothers' Employees (Tr. 564, Defendants' Exhibit A-16)	$ 9,781.24

Travel Pay of Dusenberg Brothers' Employees (Tr. 564, Defendants' Exhibit A-16)	15,168.64
Travel Pay of Employees of all Other Contractors (Tr. 539, Defendants' Exhibit A-15)	137,932.80
Unloading and transportation of Equipment of all Contractors (Tr. 556-7)	40,000.00
Total	$202,882.68

The items for travel pay were stipulated by appellant's counsel. The item of unloading and transporting of equipment was estimated by the Government engineer on the project.

The item of $90,053.81 was the payroll of the employees of Dusenberg and Weldon Bros., for work done actually within the 155 mile section of the highway. This portion of the payroll was recognized as being attributable to premium base by this Court on the prior appeal. (Opinion P. 576).

The item of $27,594.00 for maintenance work on Section A-3 was an estimate of the Government engineer. (Tr. 557, 563).

At the rehearing before the trial Court the Government engineer in charge of the work under this contract in Alaska, testified that after looking over

the proposed site of the highway to be constructed under the contract and observing that they would be unable to get into Sections A-1 and A-2 because of the Army's deployment of men, that he requested authority from his chief in Washington to divert the contractors to other sections of the highway, principally Section A-3 and A-4; that he received such authority by telegram some time between June 15, 1942, and July 1, 1942 (Tr. 501-504); that as the employees of these several contractors began to arrive in Alaska and as soon as their equipment was unloaded at Valdez and transported in to the site of the work, they were diverted to these other sections of the highway (Tr. 508). He testified that because of the muddy conditions some repair and maintenance work was done on Section A-3, although this was an existing road. (Tr. 524-7, 512, 520, 522). A few of the men from all of the contractors' organizations were used in this maintenance work and the exact payroll for such maintenance work could not be accurately determined at the time of the hearing. (Tr. 540). The engineer estimated the payroll of all contractors for such maintenance work at $27,594.00. (Tr. 557). Most of the equipment of the various contractors was shipped to Valdez by boat and there unloaded by their employees to transport in to Gulkana. At the time of the second hearing there was

no means of determining the exact payroll of the men engaged in unloading and transporting this equipment. The engineer, however, estimated that $40,000.00 was a reasonable estimate of payroll for that work.

The travel time of the employees for the period while they were enroute to Alaska and until their diversion to other sections of the highway is established by defendants' exhibit A-16 for the employees of Dusenberg and Weldon Brothers, and by defendants' exhibit A-15 for the employees of all other contractors. The amount of payroll reflected by these exhibits is conceded to be accurate by appellant in its present brief. (Appellant's Brief p. 15).

ISSUES ON THIS APPEAL

While the appellant sets forth four separate assignments of error, there are really two issues involved in the present appeal. They are:

(1). *Should the premium be based upon 50 percent of the total payroll of $1,055,214.02?*

(2). *Should interest be allowed on the judgment from date of termination of the insurance policy?*

ARGUMENT

In urging the affirmative of the first issue ap-

pellant relies, apparently upon two points, the first being set forth in its Assignment of Error No. 1. The effect of this contention, as we understand it, is that the trial Court committed error in requiring the appellant to bear the burden of proving the amount of payroll upon which this premium was predicated.

We do not believe it is possible for parties by contract to shift the burden of proof in a law suit. In the present case if we assume that the defendants failed to supply proper records to the plaintiff and thereby breached the contract, and that as a result of such breach the premium was then to be predicated upon 50 percent of the entire contract cost paid the contractors, the burden of proof would still be upon the plaintiff to establish what that contract cost amounted to. So, the problem is not one of burden of proof but rather one of interpretation of the contract.

We think it should be noted that the appellant's present theory as to how the premium should be determined is a radical shift from its position in the first trial and appeal. This present theory is no where suggested in the pleadings and it was never heretofore seriously urged until on this present appeal.

Appellant's present argument in this connection is bottomed upon a paragraph of the printed policy,

which is not applicable because eliminated by an attached endorsement. (Counsel apparently inadvertently overlooked this fact). On page 13 of its brief appellant quotes, and on page 16 repeats as a part of the insurance contract the following:

> "The named insured shall maintain for each hazard records of the information necessary for premium computation on the basis stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct." (Tr. 1 pp. 73-74).

A reference to the second page of the photostatic copy of the insurance policy, appearing in the transcript between pages 71 and 77, will show that this quoted paragraph begins with the very last line of that page. It will also be observed that this paragraph is a portion of paragraph 1, "Premium" under the general sub-head CONDITIONS. This portion of the printed policy is eliminated by endorsement No. 3, paragraph 3, in this language:

> "3. Condition 1, Premium, in the under-mentioned Policy is eliminated and the following substituted therefor:" (Tr. 84).

Actually the only provisions of the insurance policy which have to do with the maintenance of records for computing premium, are those contained in the endorsement entitled "Premium Adjustment En-

dorsement" (Tr. 77), in the following language:

> "It is hereby understood and agreed that this policy is issued upon a Monthly pay-roll basis and that immediately after the expiration of each period of One month from date of policy the Assured shall render a written statement to the Company of the full amount of remuneration paid employees during such period and shall immediately pay the premium thereon based upon the rates stated in the policy."

and the portion of endorsement No. 3 reading as follows:

> "* * * The Lytle Construction Company of Sioux City, Iowa and/or Green Construction Company shall assume responsibility for the maintenance of such records as are necessary for the computation of earned premium on said Policy, and for the payment of such earned premium to the Company. If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration of such contractor's or sub-contractor's employees is not available to the Company, the earned premium as respects such contractor or sub-contractor shall be computed by using as remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor." (Tr. 83).

With respect to the requirement upon the defendants under the first quoted endorsement, the defendants complied by furnishing to the plaintiff the periodic payrolls. (Plaintiff's Exhibit 6, Tr. 89-94; Plaintiff's Exhibit 7, Tr. 94-100; Plaintiff's Exhibit

8, Tr. 100-103; and Plaintiff's Exhibit 9, Tr. 103-106). Under the provisions quoted from endorsement No. 3, it provides that the 50% alternative method of computing premium shall be applied only "if, in case of any other contractor or sub-contractor covered as an additional named insured under said Policy, remuneration of such contractor's or sub-contractor's employees is not available to the company. * * *"

Before the insurer would be entitled under this language to compute premium by this alternative method the burden would be upon it to establish that the records for computation of premium *were not available* to the insurer. We submit that there is no evidence that this was a fact. Instead, the evidence shows that at the time of the progress of the work under the contract that the records were not only *available,* but that the entire payrolls were in fact transmitted to the plaintiff. That the government engineer as a witness at the rehearing some four or five years later, and having no access to records, was not then able to accurately give the figures of payrolls attributable to certain phases of the work, falls far short of establishing that the remuneration was "not available" within the meaning of the endorsement.

So it would seem that under any fair interpretation of the provisions of the policy and its endorse-

ments, the appellant should not now be entitled to resort to the alternative method of computing premium and thereby to use as the base for premium purposes the entire payroll of $1,055,204.02, which this Court has heretofore ruled is not the premium base.

An additional answer to the appellant's contention on this issue is that the "50% of total contract cost" method of computing premium is likewise limited to the operations within or "in connection with" the 155 mile section of highway. Both the provision providing the alternative method of computing premium and the provision limiting the policy to the 155 mile sections are incorporated in the policy by means of endorsements attached thereto. These provisions are not incompatible with each other and hence the "spatial narrowings of coverage" as used in the area limitation endorsement apply to and restrict and limit the application of the alternative premium computation endorsement. As this Court stated on the first appeal (Opinion, p. 577) "the policy does limit coverage to a specific area." Likewise that Opinion and the principles therein stated limit the premium base to remuneration emanating from such specific area.

On this issue the Court might well apply the principle suggested by it in *City of Seattle vs. Puget*

Sound Power and Light Company, 15 F. (2d) 794, in the following language at 795:

> "* * * A decree was thereupon entered in favor of the plaintiff, in accordance with the prayer of the complaint, and in accordance with the mandate of this court. From that decree the defendant has appealed.
>
> "There is no serious contention that the court below failed or refused to carry out the mandate of this court on the second trial, and, if the decision of this court on the former appeal is to be accepted as controlling on the present appeal, it only remains to consider certain affirmative defenses interposed and the form of the decree itself.
>
> "The rule is firmly established that the decision of an appellate court on appeal or writ of error is controlling upon the court below after the case has been remanded, and is equally controlling upon the appellate court on a second appeal or writ of error in the same case. No doubt isolated cases may be found where appellate courts have disregarded the rule, and their power to do so is not questioned; but the overwhelming weight of authority is in its favor, unless between the two decisions there has been some change in the law, by legislative enactment or judicial decision, which the appellate court is bound to follow. The rule itself has been iterated and reiterated by the Supreme Court and by this court." (citing cases)

"Should Interest Be Allowed From Date Of Termination Of The Insurance Policy?

On this issue appellant likewise urges two specifications of error.

One of the specifications is to the effect that the prior decision of this Court is *res adjudicata.* This contention we believe hardly merits attention. The prior decision hardly mentions the matter of interest. On the prior appeal the question of right to interest was at no time argued, considered or even suggested. The principles of *res adjudicata,* or law of the case, are never applied to issues which "merely lurk in the record." *New York Life Insurance Co. vs. Gamer,* 106 F. (2d) 375, at p. 376 (C.C.A. 9).

It is inconceivable that those principles should be here applied to foreclose a controversy over the right to interest on the sole basis of this Court's single and casual use of the word "interest" in defining the judgment appealed from. It is doubtful if the court's limited reference to interest would even raise this issue to the status of one lurking in the record.

Appellant's other assignment of error in respect of the right to interest raises the question of the right to interest before judgment on liquidated and unliquidated claims and the further question as to whether its claim for premium was in fact liquidated or unliquidated prior to judgment.

We agree with the appellant that the law of Washington must be looked to in deciding this question..

The law as applied in the State of Washington is that interest is allowable from the time the claim was due upon a liquidated account, but is not allowable on an unliquidated account, except from date of judgment. An exception to this rule is that interest may be allowed from the date due on an unliquidated account if the amount of the claim can be determined by mere computation. The Washington court further holds that a claim is unliquidated to a degree that it cannot be determined by mere computation whenever it requires evidence to establish the quantity or amount of the claim.

In *Wright vs. Tacoma,* 87 Wash. 334, 151 Pac. 837, the rule is stated as to both liquidated and unliquidated accounts. The case was a suit by the plaintiff on a contract with the City of Tacoma for the installation of a water system. Regarding the right to interest the Court says, beginning at page 352:

> "One other question is presented which requires consideration. The trial court included in the judgment interest from the first day of June, 1913, that being the day upon which the pipe line was accepted by the city. Of the amount claimed by the respondent at that time, $71,444.84 was not in dispute, this apparently being the amount withheld by the city until the acceptance of the work. But, as already stated, this was not paid until September 12, 1913, when $60,000 was paid, and October 5, 1913, when the balance of

$11,444.84 was paid. The trial court allowed interest on these two amounts from the date of the acceptance of the work until the respective payments were made. On the other items, amounting to $98,042.48, the trial court likewise allowed interest from the time of the acceptance of the work until that sum should be paid.

"The general rule is that interest will not be allowed upon unliquidated demands prior to the time when such demands are merged in the judgment. This rule, however, like many general rules, has its exceptions. *Modern Irrigation & Land Co. v. Neely*, 81 Wash. 38, 142 Pac. 458. One of the exceptions is that interest will be allowed upon an unliquidated demand when the amount thereof can be ascertained by mere computation. In *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381, it was said:

'The courts are not in harmony on the question, but the general rule is that interest will be allowed on an unliquidated demand, the amount of which can be ascertained by mere computation, from the time the demand accrues.'

* * *

"Where, however, the *demand is for something which requires evidence to establish the quantity or amount of the thing furnished*, or the value of the services rendered, interest will not be allowed prior to judgment. * * *."

* * *

"Applying these rules to the present case, we are of the opinion that, as the $71,444.84, the trial court properly allowed interest. Upon this item there appears to have been no dispute. Evidence was not required to establish the amount thereof. As to the other items which were in-

> cluded in the total of $98,042.48, interest could not be allowed prior to the entry of the judgment. With possibly one exception, the items which made up this amount were in dispute, *either as to the amount of work done*, or the material furnished, or the price which was to be paid therefor. *It being necessary to establish by evidence the amount of the services furnished*, or the quantity of the material supplied, and not being able to establish these either by computation or by reference to a known standard, interest prior to the date of the judgment was improperly allowed." (Italics ours).

Brewster v. State, 170 Wash. 422, 16 P. (2d) 813 is another action upon a Public Works contract. As to the plaintiff's right to interest upon disputed items the court says, at page 424:

> "Interest should not have been allowed upon the recovery of $18,512.78 prior to the date of the judgment. The demands on both sides, that of the contractor for $29,700.33 and that of the state for $2,231.83, were unliquidated. As to some of the items, evidence was required to establish the value of the services rendered. As to the other items, the classification thereof and the price to be paid therefor were disputed. *It was essential that evidence be adduced to establish the quantity of work performed*, as well as its classification, to ascertain the amount due. In *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837, we held that 'Where, however, the demand is for something *which requires evidence to establish the quantity or amount of the thing furnished*, or the value of the services rendered, interest will not be allowed prior to the judgment'." (Italics ours).

In our present case it was necessary to take evidence to determine how much payroll was actually expended for work done within the 155 mile limits; it was necessary to take evidence to determine how much payroll represented wages paid the employees for the time they were en route to Alaska; it was necessary to take evidence as to what portion of total payroll was expended in unloading equipment at Valdez and transporting it to Gulkana, and additionally, it was necessary to take evidence as to what portion of payroll was expended in maintaining Section A-3. All of this evidence was required in order to determine the claim of the appellant in accordance with the formula indicated by this Court's prior opinion. The claim could not be determined by "mere computation" until evidence was adduced respecting the length of periods of employment, the number of men engaged, the amount of time required, etc., on the several phases of the work which were held to be operations in connection with the 155 miles of highway.

An additional reason for refusing interest on unliquidated accounts as stated by the Washington Supreme Court, is that in such circumstances interest is in the nature of a penalty and should only be allowed for a default; that since there can be no default in connection with an unliquidated demand — because

the obligor does not know the amount of the obligation — interest is disallowed.

In *Ferber v. Wisen*, 195 Wash. 603, 82 P. (2d) 139 the action was one for wages under the State Minimum Wage For Women Act. By that Act and regulations issued under it, certain fixed weekly wages were required as minimum wages. The plaintiff had been employed by the defendant for a lesser sum than the minimum wage. However, in that action there was a dispute as to the period of employment and as to the off-sets for board and room furnished the plaintiff. Under the Minimum Wage Act, allowances for board and room were also fixed in definite amounts. The plaintiff sued for $1705 and the trial court allowed $207.90, giving effect to some of the claimed off-sets. With respect to the question of interest which was disallowed by the trial court, the Supreme Court says, at page 610:

> "It is assigned as error that the court refused to allow interest except from the date of judgment, and contended that interest on the amount of each monthly recovery, as it became due, should have been allowed, or, at least, interest from the date of judgment. It is a general principle that interest is not allowed upon unliquidated demands prior to the time when such demands are merged in the judment unless the amount thereof could have been ascertained by mere computation. *Wright vs. Tacoma*, 87 Wash. 334, 151

Pac. 837. Where no interest is stipulated for, its allowance is by way of damages on account of default. The reason why it is not allowed on unliquidated demands is said, by Sutherland in Sec. 347 in the 4th edition of his work on Damages, to be as follows:

"'Interest is denied when the demand is unliquidated, for the reason that the person does not know what sum he owes and therefore cannot be in default for not paying'.

"In this case, as the court found, neither of the parties supposed that anything was due or owing during the course of the employment. The appellants' demand, when made, was for $1,705. The respondent was not in default in not complying with the demand. She did not know — no one knew — what sum she owed or that she owed anything until the court found the facts, construed the order, and pronounced judgment in the case."

See also *Great Northern Railway Company v. Washington Electric Company*, 197 Wash. 627 at p. 650, 86 P. (2d) 208, where the Court says:

"In *Ferber v. Wisen*, 195 Wash. 603, 82 P. (2d) 139, a case decided since the trial court rendered its decision in the instant case, it is pointed out that, where no interest is stipulated for, its allowance is not, strictly speaking, an allowance as interest, but as damages on account of default, and that the reason no allowance is made on unliquidated demands is because the person against whom the demand is made does not know what sum he owes and, therefore, cannot be in default for not paying."

In accordance with this principal appellees should not be penalized by the exaction of interest for failing to pay the demand originally made upon them by appellant. It must be obvious that at the time demand was made by appellant for the full premium that neither party actually knew what was due.

The Washington court has gone so far as to hold that even where one pays the obligation of another that in a suit for reimbursement he is not entitled to interest from the date of payment.

In *Nelson v. Seattle*, 180 Wash. 1, 38 P. (2d) 1034, the action involves claims growing out of the Denny Regrade contract between the plaintiff Nelson and the City of Seattle. It involves several subcontractors. One of the sub-contractors, Vigilant Towing Co., was to convey the earth being removed, from the dock to a point out in the bay where it was dumped. In carrying out this sub-contract the Vigilant Towing Company caused shoals to be deposited by dumping too much of the dirt in one place thereby endangering navigation, which was in violation of a War Department permit. The principal contractor, Nelson, the plaintiff, was required to dredge the shoals at a cost to him of $10,125.00.

This amount he actully paid for the dredging and the lower court allowed him interest from the

date of payment. The Supreme Court, however, disallowed the interest, saying, at page 28:

> "Vigilant assigns error to the allowance by the trial court of interest on $10,125 from November 18, 1931. That is the date Nelson paid for the dredging of the shoals. The theory of the allowance of interest was that payment for the dredging made the claim a liquidated one against Vigilant, since the payment made was the reasonable cost of the dredging. We do not so view it. The question of liability and the reasonable cost of dredging was still open to contest after the payment was made by Nelson. The claim was unliquidated, and, therefore, interest was not allowable on it until it was reduced to judgment. *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837.

Probably the most recent pronouncement of the Washington court on this question is that contained in *State of Washington v. Northwest Magnesite Co.*, 127 Wash. Dec. (No. 22) 900.

This was an action by the State for royalties alleged to be due under a lease of public lands to the defendants for mining or quarry purposes. The lease provided for the payment of a royalty at the rate of 4% on the basis of moneys received by the lessee from the sale of magnesite products by it, after deducting therefrom the cost of transportation and treatment. Judgment was entered in favor of the State for

unpaid royalties but interest was disallowed. The Court held, at page 934:

> "Appellant complains that the court erred in refusing it interest on sums found owing by respondents. It takes the position that the additional royalties due from Northwest are a liquidated debt. With this contention we do not agree.
>
> "There was an honest dispute between the parties to the contract as to the meaning of the terms 'moneys received' and 'transportation and treatment', so that even an approximate measure of liability could not be ascertained by the lessee until that dispute was adjudicated. Neither the judgment of the trial court nor the measure of delinquent royalties arrived at by this court represents a debt which might have been determined without resort to compromise or else to a lawsuit. In these circumstances, the state has no claim upon the respondents for interest accruing prior to judgment. *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837; *Fowler vs. Gray*. 141 Wash. 372, 251 Pac. 570; *Ferber v. Wisen*, 195 Wash. 603, 82 P. (2d) 139; *Fiorito v. Goerig*, 127 Wash. Dec. 574, —— P. (2d) —— Sec. 40 C. J. 1027, 1028, Mines & Minerals, Sec. 633."

The case of *Empire State Surety Company v. Moran Brothers Company*, 71 Wash. 171, 127 Pac. 104, which is so heavily relied upon by appellant, is readily distinguished. It will be noted by an examination of that case that the primary issue as to the amount of premium depended solely upon an interpretation of certain words in the contract. The Court

states the question as follows at p. 176:

> " * * * do the words of the schedules under the heads 'Kind of trade or business,' and 'Kind of work' refer generally to the nature of the work carried on at the places designated, so as to include all who are engaged in the prosecution of the work; or are those words used only as names of specific trades, so as to confine their meaning to specific classes of artisans or workmen there employed. * * *"

In discussing the right to interest the court says that the amount of premium was determinable by computation and that the fact that the legal basis of the computation was a subject of controversy between the parties was immaterial. But it must be obvious that the "legal basis of the computation" involved only the interpretations of the words "kind of trade or business" and "kind of work" and that when that interpretation was legally determined that then the amount of premium was merely a matter of computation. No further evidence was required to determine the premium. In our case, however, after the scope of the policy was determined by this court, it was still necessary to take evidence as to numbers of men, periods involved, necessity of work as being in connection with the 155 miles, etc., in order to determine the amount of premium. As indicated in the present rule of the Washington court a claim is not determinable by mere computation if evidence is

required to establish its amount.

We consider it advisable to make the following brief comments concerning some of the other cases relied upon by the appellant.

We have no quarrel with the principle stated in the excerpt quoted by appellant (Apt's Brief p. 31), from *Dornberg v. Black Carbon Coal Co.*, 93 Wash. 682, 161 Pac. 645. Here the certainty of appellant's claim was never determinable prior to the rehearing by the trial court.

The case of *Dickinson Fire & Pressed Brick Company v. Crowe & Company*, 63 Wash. 550, 115 Pac. 1087 (Apt's Brief p. 31), merely holds that a liquidated claim is not rendered unliquidated because of the fact an unliquidated counter claim is asserted against it.

The case of *Lloyd v. American Can Company*, 128 Wash. 298, 222 Pac. 876 (Apt's Brief p. 33) reiterates the rule established by the Washington court to the effect that where evidence is required to establish the amount of the claim interest will not be allowed prior to judgment. It quotes from *Wright v. Tacoma, supra* in support of the rule.

The case of *Hill v. Brandes*, 1 Wash. (2d) 196, 95 P. (2d) 382 (Apt's Brief p. 33) was a suit by the

receiver of an insolvent corporation to recover moneys paid by the corporation after the corporation became insolvent. Obviously the amount of these payments were liquidated and were entitled to draw interest from the date of payment by the insolvent corporation and that was what the court allowed.

Barbo v. Norris, 138 Wash. 627, 245 Pac. 414, (Apt's brief p. 33) was an action by a sub-contractor against the principal contractor and a railroad company for which certain grading work was done. The suit was for payment due under the sub-contract and the railroad was joined to assert the sub-contractor's lien against its property. The controversy was not over quantities or credits given, as appellant states, but rather was over the question whether the sub-contractor had completed his work and whether delay penalties were caused by the principal contractor or the sub-contractor and whether the liens could be asserted against the railroad. The court found that the plaintiff sub-contractor had completed his contract and was not responsible for delay and hence the amount due him was determinable by mere computation and was entitled to interest from date of completion of contract. There was no dispute as to quantities of work or price allowable therefor.

Appellant states the case of *Yarno v. Hedlund*

In the

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11639

C. F. LYTLE COMPANY, INC., a corporation, and GREEN CONSTRUCTION COMPANY, a Corporation, *Appellee*,

vs.

HANSEN & ROWLAND, INC., a corporation, *Appellant*.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

PETITION FOR REHEARING

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Box & Lumber Company, 135, Wash. 406, 237 Pac. 1002) (Apt's brief p. 34) is quite similar to the one at bar. The only similarity is that it was a second appeal. The situation in that case is well expressed in the first few lines in the Opinion, as follows:

> "Plaintiff brought an action to recover upon a logging contract. A jury trial resulted in a verdict for $22,310. Upon appeal we held that, inasmuch as the sums of money due under the contract were not payable excepting at certain specified times, a judgment for the whole amount at the time of trial would be more valuable than the right to receive the money at a later period, and that therefore the amount of the judgment should be reduced. * * *."

Upon remand the trial court found that the worth of the recovery at the time of the verdict was $19,065.69 and entered judgment for that amount together with interest from the date of the original judgment. On the second appeal the Supreme Court held that the original judgment liquidated the amount of the claim and hence interest should attach from that time. That situation is quite different than ours, where the original judgment did not liquidate the claim, and in fact evidence was thereafter required to determine the amount of it.

It is submitted that the present judgment is in strict conformity with this court's directions on the former appeal in respect of the amount of the pre-

mium due and that it likewise is in conformity with the law of Washington in respect of the right to interest and that it should be affirmed.

Respectfully submitted,

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